No. 18-281

In The Supreme Court of the United States

VIRGINIA HOUSE OF DELEGATES, ET AL.,
Appellants,

v.

GOLDEN BETHUNE-HILL, ET AL.,
Appellees.

On Appeal from the Unites States District Court for the Eastern District of Virginia

AMICUS BRIEF FOR LEE CHATFIELD, IN HIS OFFICIAL CAPACITY AS SPEAKER-ELECT OF THE MICHIGAN HOUSE OF REPRESENTATIVES, AARON MILLER, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE MICHIGAN HOUSE OF REPRESENTATIVES, JACK BERGMAN, BILL HUIZENGA, JOHN MOOLENAAR, FRED UPTON, TIM WALBERG, PAUL MITCHELL, GEORGE HOLDING, VIRGINIA FOXX, MARK WALKER, DAVID ROUZER, RICHARD HUDSON, PATRICK McHENRY, MARK MEADOWS, AND TED BUDD AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

Representative Lee Chatfield, in his official capacity as Speaker-Elect of the Michigan House of Representatives, and Representative Aaron Miller, in his official capacity as a member of the Michigan House of Representatives, each a Member of the Michigan Legislature, Members of Congress representing Michigan including Jack Bergman, Bill Huizenga, John Moolenaar, Fred Upton, Tim Walberg, and Paul Mitchell, and Members of Congress representing North Carolina including George Holding, Virginia Foxx, Mark Walker, David Rouzer, Richard Hudson, Patrick McHenry, Mark Meadows, and Ted Budd (collectively "Amici Curiae") submit this Amicus Brief in support of Appellants.[2]

The Amici Curiae have a vital interest in the law of redistricting. Michigan's House of Representatives is one of two legislative bodies

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae made a monetary contribution to its preparation or submission.

[2] On December 26, 2018 the Virginia House of Delegates submitted a general consent to the filing of amicus briefs before the Court. On January 2, 2018, both State Defendants and Plaintiffs consented to the filing of this amicus brief.

bestowed with the constitutional obligation to prepare and enact legislation "to regulate the time, place and manner" of elections. Mich. Const. art. II, § 4; *see also* Mich. Const. art. IV, § 1 (vesting the general legislative power with the Legislature); Mich. Comp. Laws § 4.261 (setting out the authority and procedure for conducting reapportionment); U.S. Const. art. I, § 4 (granting the legislatures of the states the power to regulate congressional elections unless Congress choses to act). As ranking members of the Michigan Legislature, Amici Representatives would be required to play an integral part in drawing and enacting remedial plans requisite to comply with an order from a court as the result of redistricting litigation. The Michigan Members of Congress and Michigan representatives filing here are Defendant-Intervenors in *League of Women Voters of Mich. v. Johnson*, No. 2:17-cv-14148 (E.D. Mich. filed Dec. 22, 2017), a federal case alleging partisan gerrymandering claims against Michigan's state legislative and congressional maps, which is set for trial in February. Amici Curiae's intervention in *League of Women Voters of Mich. v. Johnson* was granted by the United States Court of Appeals for the Sixth Circuit. *League of Women Voters of Mich. v. Johnson*, 2018 U.S. App. LEXIS 36083 (6th Cir. Dec. 20, 2018); *League of Women Voters of Mich. v. Johnson*, 902 F.3d 572 (6th Cir. 2018). The Members of Congress from North Carolina are representatives of districts subject to a challenge currently pending before this court in *Rucho v. Common Cause*, No. 17-1295 (U.S. filed Jan 12, 2018), but are not defendant-intervenors in that case, although they could have elected to intervene in that case.

Apportionment "is primarily a matter for legislative consideration and determination and . . . judicial relief becomes appropriate only when a legislature fails to reapportion . . . ." *Reynolds v. Sims*, 377 U.S. 533, 586 (1964). Therefore, the Michigan Legislature, led in part by Speaker-Elect Lee Chatfield and made up in part by Representative Aaron Miller, would be directly impacted by an order of any court requiring a modification or redrawing of Michigan's apportionment plans. Even more, Amici Curiae are currently Defendant-Intervenors in a challenge to Michigan's apportionment plans. *See League of Women Voters of Mich.*, No. 2:17-cv-14148.

In this way, Amici Curiae are similarly situated to Appellant Virginia House of Delegates ("Virginia House of Delegates" or "House of Delegates") who themselves were Defendant-Intervenors in the court below. Accordingly, any ruling by the Court in this case—particularly regarding standing—has obvious and widespread implications for the Amici Curiae in their current litigation, in any future appeals of the current litigation, and in future redistricting cases.

ARGUMENT

On November 13, 2018 the Court announced that it postponed jurisdiction in this matter and, *inter alia*, directed the parties to fully brief the question of whether the Virginia House of Delegates has standing to bring this appeal. While the parties have addressed this issue in their briefs regarding the Application for a Stay Pending Appeal, Responses, and Reply, Amici Curiae write separately

to emphasize the important reasons the Virginia House of Delegates, and intervenors similarly situated to them in other redistricting cases, has standing to appeal.

Plaintiffs-Appellees (hereinafter "Plaintiffs") in this case initiated this action against the Virginia State Board of Elections, the Virginia Department of Elections, and various election officers (hereinafter "State Defendants") challenging 12 majority-minority state house districts in Virginia as unconstitutional racial gerrymanders. JS.App. 6.[3] This occurred after Governor McDonnell, a Republican, was not eligible to run for re-election due to term limits, and Governor McAuliffe, a Democrat, won the election for governor. The Virginia House of Delegates, which is majority Republican, and its Speaker, also a Republican, intervened without objection, in order to "takeover the defense of the constitutionality of the House's districts and their role in enacting them". Emergency Application For Stay at 7. The district court granted the Virginia House of Delegates' intervention as of right pursuant to Rule 24(a)(2).

Eventually, the district court determined that some of the house districts were unconstitutional and directed the General Assembly to pass a remedial map before October 30, 2018. JS.App. 202-03. If the General Assembly did not pass a remedial map before then, a court-run remedial proceeding would follow. *Id.* Governor Northam, a Democrat, then announced that he would not sign *any* new

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[3] "JS.App." refers to the appendix to the jurisdictional statement in this case. *See* No. 18-281.

districting plan passed by the General Assembly. ECF No. 275, Ex. 1. This resulted in a legislative deadlock under Virginia's redistricting process. Accordingly, the district court has begun its remedial map-drawing proceedings.

In the meantime, the Virginia House of Delegates appealed the district court's decision to this Court. The State Defendants, led by a Democratic administration (the political party opposite of that in control of the House of Delegates), now oppose the House of Delegates' involvement in the case, claiming it does not have standing to appeal. Specifically, the State Defendants argue that the State's Attorney General is the exclusive agent to defend the state and there is no other state law that provides such power to the House of Delegates. However, State Defendants fail to acknowledge, or perhaps purposefully ignore, the fact that this case falls into a special subset of cases that uniquely impacts legislatures and legislators—challenges to redistricting.

Because the Virginia House of Delegates properly intervened in the case and because their involvement, and the involvement of legislatures similarly situated to them in other cases, is invaluable and indeed necessary to redistricting litigation, they have standing to bring this appeal.

I. INTERVENING LEGISLATORS HAVE STANDING TO APPEAL REDISTRICTING CASES

Legislators that intervene to defend redistricting challenges have standing to appeal in

those cases because redistricting challenges are different than challenges to ordinary legislation.

Article III, standing is necessary for any federal case, even those involving appeals by the original defendants. *Diamond v. Charles*, 476 U.S. 54, 56 (1986). "To qualify as a party with standing to litigate, a person must show, first and foremost, 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)) (internal citations and quotation marks omitted). "[A]n intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017).

Legislatures that intervene to defend redistricting plans have standing to appeal even in the absence of the original defendants. This is because (1) redistricting involves concerns that are unique to legislatures and legislators; (2) legislators distinctly possess sufficient Article III interests when their districts are at issue; and (3) permitting intervening legislators to appeal redistricting challenges is necessary to the adversarial system and administration of justice. There can hardly be more actual or imminent harms to legally protected interests than those of legislatures defending their own constitutionally mandated actions or legislators defending their own districts.

In addition, the Courts of Appeals and the three-judge district courts that have been presented with Congressional redistricting cases usually grant

Members of Congress intervention. *See, e.g., League of Women Voters of Mich. v. Johnson*, 902 F.3d 572 (6th Cir. 2018); *Perez v. Abbott*, 274 F. Supp. 3d 624, 687 (W.D. Tex. 2017) (as plaintiff-intervenor); *Baldus v. Members of the Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 847 (E.D. Wis. 2012); *Diaz v. Silver*, 978 F. Supp. 96, 98 (E.D.N.Y. 1997); *King v. State Bd. of Elections*, 979 F. Supp. 582 (N.D. Ill. 1996); *Johnson v. Mortham*, 915 F. Supp. 1529 (N.D. Fla. 1995); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 639 (N.D. Ill. 1991) (as plaintiffs-intervenors); *Daggett v. Kimmelman*, 535 F. Supp. 978 (D.N.J. 1982).

a. Redistricting Challenges Involve Unique Concerns Sufficient to Confer Article III Standing on Legislators.

Redistricting and challenges thereto involve unique concerns that clearly distinguishes redistricting legislation from other legislation. *See, e.g., Hastert v. Ill. State Bd. of Election Comm'rs*, 28 F.3d 1430, 1444 (7th Cir. 1993) ("recogniz[ing] the perhaps peculiar circumstances of redistricting cases generally."); *Navajo Nation v. Arizona Redistricting Comm'n*, 230 F. Supp. 2d 998, 1007 (D. Ariz. 2002) (recognizing the "unique political processes that come into play in [redistricting] cases."); *Page v. Bartels*, 248 F.3d 175, 190 (3rd Cir. 2001) ("[T]he legislative history of the 1976 revisions to 28 U.S.C. § 2284 clearly demonstrates that Congress was concerned less with the source of the law on which an apportionment challenge was based *than on the unique importance of apportionment cases*

generally.") (emphasis added); *King v. Ill. State Bd. of Election*, 410 F.3d 404 (7th Cir. 2005) (attorneys fees and costs awarded to defendant-intervenors because "redistricting cases often present 'peculiar circumstances'") (internal citation omitted).

Unlike challenges to more traditional laws, challenges of redistricting involve legislative conduct that is mandated by either the state constitution or the federal constitution. In other words, redistricting legislation is not optional or elective legislation. If a court strikes down legislation setting legislative boundaries, the legislation must be replaced by the applicable state process or by the court that struck down the boundaries.

Specifically, for the purposes of the present appeal, the Constitution of Virginia mandates the General Assembly reapportion its own districts every ten years. Va. Const. art. II, § 6. Similarly, in the cases where state legislators or Members of Congress intervene to defend congressional redistricting, the Elections Clause of the United States Constitution states that "[t]he times, places and manner of holding elections . . . *shall* be prescribed in each state by the legislature thereof . . . ." (emphasis added) U.S. Const. art. I, § 4. This mandate is one of the fundamental and indispensable principles of federalism.

For the purposes of redistricting litigation, these constitutional provisions mean that in addition to having the obligation to pass a new map in the first instance, the legislature will be (and should be) tasked with passing a remedial map. *See, e.g., Upham v. Seamon*, 456 U.S. 37 (1982); *Reynolds*, 377 U.S. at 586 (Apportionment "is primarily a matter for legislative consideration and determination and .

. . judicial relief becomes appropriate only when a legislature fails to reapportion . . . .'). Thus, "before [a] Court undertakes the "unwelcome obligation" of fashioning a remedial plan, the Court must afford the Legislature an opportunity to reapportion . . ." *Perez v. Abbott*, SA-11-CV-360, order, (W.D. Tex. Aug. 30, 2018). The redistricting context is the only one in which legislatures have such a responsibility to remedy. And the Court has recognized remedial responsibility previously. *See Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 194 (1972) (recognizing intervention is appropriate for the Minnesota State Senate because that body would be directly impacted by the district court's orders). Legislators clearly thus have a sufficient interest in the subject matter of this litigation that is materially distinguishable from the generalized interest shared by all citizens. *See, e.g., id.* (recognizing that state legislators have the right to intervene because the state legislature would be directly affected by a district court's orders.).

Legislators' remedial responsibility in redistricting cases accordingly make them necessary participants in any remedies stemming therefrom. Given this necessary role of legislators in redistricting litigation, it follows that they have standing to appeal from a decision requiring them to undertake such a responsibility. This is very different from challenges of laws such as abortion laws, *Diamond*, 476 U.S. 54 (1986), laws mandating a moment of silence in schools, *Karcher v. May*, 484 U.S. 72 (1987), ballot initiatives banning gay marriage, *Hollingsworth v. Perry*, 570 U.S. 693 (2013), laws making English the official language, *Arizonans for Official English*, 520 U.S. 43, *et seq.*, in

that the legislatures are tasked with reapportioning after an adverse decision. Unlike these other types of cases, replacement maps are required by the United States Constitution. And the circumstances of this case are even distinct from cases in which congressmen have intervened to defend their own districts where none were willing to run in new districts because it is the legislators themselves who are defending the very districts that they drew and will have the responsibility to redraw upon an unfavorable opinion in the district court. *Cf. Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016). This is both an opportunity and an "unwelcome obligation" as fulfilling their constitutional mandate takes incredible resources and time to accomplish.

In this manner, the legislatures are akin to the Immigration and Naturalization Service in *INS v. Chadha*, 462 U.S. 919 (1983). State legislatures essentially administer the redistricting process, as mandated by U.S. Const. art. I, § 4 and their respective state constitutions. In *INS v. Chadha*, this Court held that:

> [w]hen an agency of the United States is a party to a case in which the Act of Congress it administers is held unconstitutional, it is an aggrieved party for purposes of taking an appeal . . . . The agency's status as an aggrieved party . . . is not altered by the fact that the Executive may agree with the holding that the statute in question is unconstitutional.

462 U.S. 919, 931. *See also Karcher*, 484 U.S. at 84 (White, J., concurring) ("we have now acknowledged that the New Jersey Legislature and its authorized representative have the authority to defend the constitutionality of a statute attacked in federal court."). Parallel reasoning holds true for legislatures, legislators, and Congressmen in redistricting challenges. There is no other state body, not even the executive, that administers as much control over the redistricting process as the legislature and its component legislators, absent a delegation of authority to some state agency or commission. *See also* Emergency Application for Stay at 14.

Accordingly, reapportionment involves unique issues and concerns, which result in intervening legislators' and Members of Congress' standing to appeal in these narrow types of cases.[4]

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[4] Another example of the uniqueness of redistricting litigation is the requirement that plaintiffs must, at a minimum, be made up of individuals from each challenged district. *Gill v. Whitford*, 138 S. Ct. 1916 (2018). Accordingly, under the Court's precedents, only a handful of plaintiffs and a federal court can overturn the will of millions of voters acting through their elected representatives. This is a power given in no other type of litigation—even class action plaintiffs have far less power in the federal courts.

b. Intervening Legislators Have Article III Interests Which are Certain to be Impaired by Redistricting Challenges.

Aside from the unique legislative concerns discussed *supra*, redistricting litigation implicates intervening legislators' interests sufficient to confer Article III standing. These interests include: (1) the economic harm to legislators and their successors that is caused by increasing costs of election and reelection; (2) the reduction in legislators' or their successors' reelection chances that may result from any redrawing of apportionment plans; and (3) legislators will be forced to expend significant public funds and resources to fulfill the remedial orders sought by Plaintiffs.

Legislative intervenors in redistricting cases have distinct economic interests in the litigation. An economic interest is the quintessential injury in fact under Article III. *Barlow v. Collins*, 397 U.S. 159, 163-64, 172, n.5 (1970) (Brennan, J., dissenting). *See also Democratic Party v. Benkiser*, 459 F.3d 582, 586-88 (5th Cir. 2006) (an injury in fact exists when "campaign coffers" are "threatened"). If the electoral maps are changed, legislators or their successors will necessarily need to expend additional funds to adapt and engage with new constituents within new boundaries. The likelihood of legislators' or their successors' "campaign coffers" being threatened is a sufficient interest to warrant Article III standing.

Legislative intervenors in redistricting challenges also have an interest in their reelection chances. This type of interest has been long noted in the context of Article III standing. *See Meese v.*

Keene, 481 U.S. 465, 475 (1987); *Bay Cty. Democratic Party v. Land*, 347 F. Supp. 2d 404, 423 (E.D. Mich. 2004) (diminishment of political power is sufficient for the purposes of standing); *Smith v. Boyle*, 144 F.3d 1060, 1061-63 (7th Cir. 1998); *Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994) (Conservative Party official had standing to challenge the ballot position of an opponent); *Owen v. Mulligan*, 640 F.2d 1130, 1132-33 (9th Cir. 1981) (holding that the "potential loss of an election" is an injury in fact); *Democratic Party of the U.S. v. National Conservative Political Action Comm.*, 578 F. Supp. 797, 810 (E.D. Pa. 1983) (three-judge panel), *aff'd in part and rev'd in part on other grounds sub nom. Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 489-90 (1985). *Cf. Wittman v. Personhuballah*, 136 S. Ct. 1732 (evidence of impairment of reelection prospects can constitute an Article III injury for standing purposes).

Should a court order any remedy sought by plaintiffs in a redistricting challenge, as discussed *supra*, legislators would be required to, in their official capacities, expend significant legislative funds and resources towards the extraordinary costs of developing apportionment plans and adding unscheduled session days to the legislative calendar. *See Terrazas v. Ramirez*, 829 S.W.2d 712, 727 (Tex. 1991) (Gonzalez, J. & Cornyn, J., concurring) (noting the added expense of special legislative sessions). Expenses involved with redistricting include, but are not limited to, acquiring the software and databases necessary to process and map statewide data, engaging numerous skilled personnel and

consultants, holding several fully staffed public hearings, and related opportunity costs.

Even if such a remedy occurred during regular sessions of the legislature, the time and attention of legislative branch staff normally assigned to handle other matters would have to be reassigned to handle what is otherwise typically a decennial matter.

c. Permitting Intervening Legislators to Appeal Redistricting Challenges is Necessary to the Adversarial System and Public Policy.

Section 2 jurisprudence and redistricting challenges generally have been undergoing a rapid and dynamic evolution in recent years. In such circumstances, it is incredibly important to provide courts with robust legal arguments and policy insights. The best way, indeed the only way, to ensure such robustness of debate and soundness of jurisprudence is to also ensure truly adversarial representation before the courts. Blocking the ability of the only sincerely adverse parties in many redistricting cases, the state legislatures and Members of Congress, to appeal judgements that are unfavorable to their interests and contrary to law, serves no policy benefit other than to reward wily litigation strategy.

After the House of Delegates intervened, and assumed the defense in the district court, a prior appeal to this court, and again the district court on remand, the Democratic-led State Defendants now argue that the Republican-led House of Delegates lacks standing to appeal. In this particular case, whether through pure happenstance or, more

believably, through Plaintiffs' litigation strategy, Plaintiffs sat on their hands and brought suit challenging these maps several years after they were adopted, and only after a Democratic administration sympathetic to their claims took office. *See* Emergency Application for State 6.

Unfortunately, such ambush tactics are becoming common strategy in redistricting litigation, where plaintiffs strategically bring suit against sympathetic state administrations, or where administrations sympathetic to plaintiffs' suit take control after the suit is underway. These sympathetic administrations then lie in wait in order to prejudice intervening defendants and obtain an advantage for plaintiffs. This appears to be a new tactic in redistricting litigation that this court should not countenance. For example, in Michigan, challenges were brought against Michigan's 2011 legislative and Congressional maps in federal court in December of 2017, when it appeared quite possible that executive branch control would shift from Republican to Democrat in 2018. *See League of Women Voters of Mich. v. Johnson*, No. 2:17-cv-14148, (E.D. Mich. filed Dec. 22, 2017). In Pennsylvania, a federal court challenge was brought in 2017 challenging a 2011 Republican drawn map and naming only the Commonwealth's Democratic Governor and Attorney General as defendants. *See e.g. Agre v. Wolf*, No. 17-cv-04392 (E.D. Pa. filed Oct. 2, 2017). Additionally, plaintiffs in redistricting cases are now following similar tactic in states with elected state Supreme Courts. For example, in Pennsylvania, plaintiffs challenged the 2011 Congressional maps on state law grounds in 2017 after control of the Pennsylvania Supreme Court

changed from Republican to Democrat, which resulted in the state's Supreme Court redrawing the Congressional district map itself. Similarly, a recently filed state court case was filed shortly after the 2018 elections, when Plaintiffs were able to observe that a vocal opponent of "partisan gerrymandering" was elected to the North Carolina Supreme Court.

This same patter has played out before courts hearing these cases. *See generally, e.g.*, Transcript of Trial Day 3: Afternoon, *Agre*, No. 17-cv-04392 at 39:15-23 ("co-defendant" Pennsylvania Democratic Governor taking no substantive actions on the trial record until closing argument where he vociferously sided with plaintiffs in arguing that the map was a partisan gerrymander); *id.* at 55:12-16 (In rebuttal "I thought they were on our side of the V. That was quite a speech by the Governor's counsel, who basically just utterly abandoned the state's duly enacted law . . . ."); *see also generally League of Women Voters of Mich.*, No. 2:17-cv-14148 (in midst of litigation, a Democrat was elected Michigan Secretary of State while Republican predecessor was defending a redistricting plan alleged to discriminate against Democrats). *See also id.* Order Denying Renewed Mot. Intervene (ECF No. 144-1) (Quist, J., dissenting) ("[The political landscape completely changed with the November 6 election . . . . it is difficult to imagine that the new Democrat Secretary will continue to defend a Republican-adopted redistricting plan that is alleged to discriminate against Democrats and the Democratic Party.").

The political affiliation of parties and intervenors matter immensely in redistricting cases. It is becoming clear that many litigants are using

such litigation to achieve "end-runs" around the states' proper political processes. Through such litigation against sympathetic executives, litigants achieve redistricting on their terms, and sympathetic executives avoid the political consequences of vetoing redistricting bills. Prohibiting legislatures and legislators, especially those affiliated with a different political party than their executives, from fully participating in these kinds of cases—including appeals—unquestionably hamstrings the legal and legislative processes. Of course, this is not to say that there is some requirement that representatives from all political parties must be parties to redistricting litigation, but rather that if legislators, who duly enacted the challenged maps, properly intervene to defend those maps and must redraw them under adverse rulings, then they must have standing to further defend those maps on appeal.

Due to the particular character of redistricting challenges, the rapidly evolving jurisprudence, and the positions of the parties, no party, no court, and no citizen will benefit from a scenario in which state defendants surprise the parties to redistricting litigation with an eleventh hour change in position. Recognizing intervening legislatures' standing to appeal adverse redistricting decisions in redistricting cases is essential to the adversarial process with a full and robust trial on the issues from all sides. Ignoring political reality and hoping defendant state executives act in a way that is manifestly antithetical to their political parties' interests benefits no one.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request that the Court hold that the Virginia House of Delegates has standing to appeal. Respectfully submitted this 4th Day of January, 2019.

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